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PETITION FOR CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-172

JIN WON PARK and THE SYSTEMS CORPORATION, a Hawaiian corporation,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Jin Won Park and the Systems Corporation, a Hawaiian corporation, hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit affirming a decision of the Immigration and Naturalization Service denying a waiver of the two year foreign residence requirement on the ground of exceptional hardship.

OPINIONS BELOW

The memorandum decision of the Court of Appeals has not been published. It is appended hereto as Appendix A. The recommendations of the U. S. Magistrate and the Order of the United States District Court for the District of Oregon is included as Appendix B.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was made and entered on April 26, 1978. A timely petition for rehearing was denied on May 25, 1978, without opinion. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 USC Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can the Immigration and Naturalization Service discriminate among U. S. citizen children of alien subject to the two year foreign residence requirement applicable to some exchange students by adopting different standards of what constitutes

"exceptional hardship" relating to various foreign countries, instead of a single standard of "exceptional hardship" which is applicable to all such children regardless of their parents' last place of foreign residence?

2. Is it a denial of a United States citizen's child constitutional right to due process of law to deport his parents when the child is of tender years, wholly dependent on the parents and is faced with probable exile for many years in a foreign country with inferior education, housing, food and sanitation, and which country lacks basic political freedoms necessary to the healthy nurture of an American citizen child.

3. Did the Court of Appeals err in construing the requirement of "exceptional hardship" which is necessary for a hardship waiver of the foreign residence requirement to be the equivalent of "extreme hardship" which is required for suspension of deportation under section 244(a) Immigration and Nationality Act (8 USC Sec. 1254(a)).

4. Did the Immigration and Naturalization Service promulgate a general rule without complying with the Administrative Procedure Act (5 USC Sec. 553) when it determined that granting a hardship waiver to petitioner Park would be a "blanket authorization for waiver . . . for anyone from Korea with a citizen child," without considering Park's case on its individual merits and without weighing the undisputed evidence offered by Park in support of the waiver.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5, United States Constitution; 8 USC Sec. 1152(e)(i); 8 USC Sec. 1101(a)15(J) and 5 USC Sec. 553. These provisions are included in Appendix C.

STATEMENT OF THE CASE

The jurisdiction of the District Court was based upon 8 USC Sec. 704 and Sec. 10(c) of the Administrative Procedure Act.

Petitioner Jin Won Park is a native and citizen of the Republic of Korea, South Korea,

and who entered the United States as an exchange student. While here he earned a Master's Degree in Electrical Engineering and is a qualified Computer Systems Engineer. He is the beneficiary of an approved petition classifying him as a preference alien filed by co-petitioner, The Systems Corporation, by whom he is employed. He also is the beneficiary of a labor certification issued by the United States Department of Labor.

While in the United States Park married a Korean national and two children have been born, the first October 15, 1972, and the second on December 25, 1975.

On December 11, 1973, Park applied for a waiver of the two year foreign residence requirement applicable to certain exchange aliens, including him, because of his claim that exceptional hardship to his first child would occur if he was required to return to Korea. Except for the two year foreign residence requirement, Park would have been eligible for adjustment of status to that of a

lawful permanent resident of the United States.

The District Director of the Immigration and Naturalization Service denied the application for waiver on June 13, 1974 and the denial was affirmed by the Regional Commissioner on January 9, 1975.

Having exhausted their administrative remedies, petitioners filed this action in the District Court. During the proceedings, Park's second child was born and the Court remanded the case to the Regional Commissioner for reconsideration. However, the Regional Commissioner again denied the waiver on March 1976, and on August 18, 1976, the District Court granted the government's motion for summary judgment. The Court of Appeals for the Ninth Circuit affirmed.

Under Sec. 12(e) of the Immigration and Nationality Act, Park, as a participant in a government funded exchange visitors program, would be required to return to his native country for a period of two years before he could become a

permanent resident of the United States, unless the requirement is waived by the Attorney General. One of the grounds for waiver is "exceptional hardship" to a U. S. citizen or permanent resident, spouse or child of the alien.

To support his application for a hardship waiver, Park produced uncontradicted evidence that his services as a highly educated and specialized computer engineer could not be utilized in Korea and that he would have great difficulty, if not an impossibility, finding a job there in order to support his family. The evidence further demonstrated that because of their father's financial condition, and the social conditions prevailing in South Korea, the children would be subjected to hardships, including inadequate food, shelter, education, reduced opportunity to learn and use the English language, poor sanitation, and that they would be living in a state immediately adjacent to a hostile and well-armed communist power that has resulted in an atmosphere of militarism and political

repression in South Korea, which would interfere with their nurture as American children

Also there would be no guarantee that at the end of the two year foreign residence, the South Korean government will allow Park to leave Korea and return to the United States. His departure to Korea would also terminate his employment with The Systems Corporation and in order to return to the United States, Park would have to obtain another offer of employment, another labor certification, and new preference status. His children will not be able to petition for him until they reach the age of 21 and there is no assurance that even if employment were offered, there will be visa numbers available or certification by the Labor Department for his specialty.

Thus, because of political considerations and the rigid requirements of the Immigration and Nationality Act, Park's U. S. citizen children may be exiled for their entire childhood in a

country which would offer them marked disadvantages, both from a psychological and physical viewpoint. Park has no relative in the United States with whom his children could live after he and his wife leave the U. S.

The basis of the decisions by the Regional Commissioner is simply that Park's U. S. citizen children would not fare any worse than U. S. citizen children of any other alien who might have to return to Korea to fulfill the foreign residence requirement. The Regional Commissioner neither considered the specific facts in Park's case to determine if there would be "exceptional hardship" on Park's children, nor did he compare the hardship to be suffered by them with the inconveniences to be incurred by U. S. citizen children of parents returning to more advanced countries, such as Great Britain, France, Germany, or Japan.

POINT I

In determining whether the hardship imposed on a U.S. citizen child by his parents' departure abroad is "exceptional" the Immigration and Naturalization Service should consider the level of hardship imposed upon all persons similarly situated and not just children going to the particular country involved.

Petitioners are not unmindful of the broad powers of Congress to legislate in the area of the admission and exclusion of aliens. Nor do petitioners dispute the necessity of the government to adopt practices and policies which are practical and which enable the will of Congress to be executed. It is, however, well-established that once within the United States, aliens are entitled to procedural due process of law Chew v. Colding, 344 U.S. 590 (1953), and what is more important in this case, their U. S. citizen children are entitled to the full panoply of protections granted by the Fifth Amendment to the

Constitution of the United States.

In enacting the two year foreign residence requirement, Congress did not intend to, nor did it by its express language, interfere with the Constitutional rights of U. S. citizen or resident alien spouses and children. Congress took pains to protect these persons from a denial of rights by granting their alien parents or spouses relief from the two year foreign residence requirement in cases of "exceptional hardship". But nowhere in the law did Congress authorize one standard of "exceptional hardship" for an American citizen's dependents who are leaving for a country such as Great Britain, for example, and another standard for those required to spend two years or more in South Korea. Cognizant of its duty to treat all such U. S. citizen dependents equally, as required by the Fifth Amendment, Congress made no such distinction. Nor has the administrative agency charged with the execution of the law made such a distinction until this case, at least to petitioners' knowledge. The guidelines established

in the administrative decisions have been uniform in application and until this case, not limited or peculiar to a particular foreign country.

POINT II

De facto deportation of a United States citizen's child's parents is a violation of his right to due process when the child is of tender years, wholly dependent on the parent, and faced with probable exile for many years in a foreign country in which he will have a deprived environment.

In weighing the impact of the two year foreign residence requirement on U. S. citizen spouses and children on one hand and the administration of the immigration laws on the other, Congress attempted to strike a balance. Consequently, if the American dependents are to undergo the ordinary hardships of a two year stay in a foreign country, such as the inconvenience of moving, changing schools, a foreign language, strange customs, and the like, the imposition is

reasonable and constitutional in light of the need to carry out Congress' policy that certain exchange visitors should fulfill their obligations to their home countries.

However, Congress also provided that if the hardships attendant upon such a move were exceptional, the balance would tip the other way, in favor of the American dependents and their alien spouse or parent. Congress did not and could not constitutionally impose upon U. S. citizens unreasonable conditions of exile, even if temporary. Nor could Congress give such U. S. citizens a Hobson's choice of departure to a country with their alien spouse or parent in which they would likely suffer danger or deprivation, or separation in order to remain in the United States to become welfare recipients with a marginal existence.

In this point, the power of Congress to deal with aliens is not challenged; only the manner in which the immigration laws have been interpreted in this case with their impact on U. S.

citizen children is at issue.

The analogy drawn by the government to the administration of the criminal law is inaccurate. The immigration laws have been held by this Court to be non-criminal in nature. Harisiades v. Shaughnessy, 342 U.S. 580 (1952). Furthermore, it is preposterous to compare the commission of a criminal act which would cause a family separation resulting from imprisonment with the retention in the United States of an alien otherwise qualified to be a lawful resident.

Nor is it reasonable to suggest that aliens will seize upon the opportunity to remain in the United States and produce children solely for that purpose. The figures provided by the Immigration Service in this case indicate that there are fewer than 400 waiver applications per year in any event. This will hardly cause the United States to be inundated by aliens or their children.

In any event, Congress anticipated the problem and decided that in appropriate cases

waivers for such U. S. citizen children should be granted.

POINT III

The Court of Appeals erred by equating exceptional hardship with extreme hardship.

In its memorandum decision, the Court of Appeals disposed of the instant case involving "exceptional hardship" by citing cases which deal with another section of the Immigration and Nationality Act, Sec. 244, which permits "suspension of deportation" in cases where long residence in the United States is coupled with "extreme hardship" attendant on deportation.

The confusion of the Court of Appeals permeated its decision and despite the fact that the deficiency was called to its attention in the petition for rehearing, no correction was made.

POINT IV

The Immigration Service erred in failing to comply with the administrative procedure act in connection with the formulation of a general rule.

In making his decisions, the Regional Commissioner indicated that no degree of hardship based upon living conditions in South Korea would satisfy his interpretation of the term "exceptional hardship" because all U. S. citizen children exiled there would be subject to the same hardships that Parks' children would suffer.

The Service has itself recognized that the Administrative Procedure Act governs rule making with respect to its regulations. 8 CFR Sec. 100.6. The Regional Commissioner in effect made a rule concerning all South Korean hardship waivers, but failed to publish or even announce the regulation as required by the Administrative Procedure Act.

If the Immigration Service had followed the provisions of the Administrative Procedure Act,

the constitutional deficiencies of the proposed rule would have been called to its attention and the matter undoubtedly corrected.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed, or in the alternative, the case should be ordered remanded to the Immigration Service for consideration of Park's case under appropriate standards to be enunciated by this Court.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIN WON PARK AND THE SYSTEMS CORPORATION, a Hawaiian corporation, Appellants,	)	No. 76-3336
vs.	)	MEMORANDUM
IMMIGRATION AND NATURALIZATION SERVICE, Appellee.	)	

Appeal from the United States District Court
for the District of Oregon

Before: ELY, TRASK and ANDERSON, Circuit Judges.

Words of sympathy would only aggravate the impact of this disposition.

We believe it suffices to say that there was no abuse of discretion in any of the administrative proceedings. The district court was correct in granting summary judgment. We are bound by prior decisions of this court. See for example, Davidson v. Immigration and Naturalization Service, 558 F2d 1361 (9th Cir. 1977); Lee v. Immigration and Naturalization Service, 550 F.2d 554 (9th Cir. 1977); Kasravi v. Immigration and Naturalization Service, 400 F.2d 675 (9th Cir. 1968).

On the de facto deportation issue we direct attention to Mamanee v. Immigration and Naturalization Service, 566 F.2d 1103 (9th Cir. 1977), and Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977), rev'g. 413 F.Supp. 827.

Appellants' reliance on Martinez de Mendoza v. Immigration and Naturalization Service, 567 F.2d 1222 (3d Cir. 1977), is misplaced. The deportation order there exposed appellants to a serious threat of physical violence from Mr. Mendoza. Here, appellants have simply asserted that living conditions in the Republic of Korea are less favorable. The Acting District Director properly found that this comparative hardship applied to all Koreans and did not "impose exceptional hardship upon (appellant's) spouse or child." See 8 U.S.C. Sec. 1182(e); Acosta v. Gaffney, 558 F.2d at 1157.

The summary judgment in favor of the appellee is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JIN WON PARK, et al, Plaintiffs,	)	
vs.	)	Civil No. 75-136
IMMIGRATION AND NATURALIZATION SERVICE, Defendant.	)	RECOMMENDATION AND ORDER

Jim Won Park (Park) and his employer, The Systems Corp., plaintiffs in this action, seek judicial review of an adverse ruling of the Immigration and Naturalization Service (INS). INS denied Park's petition for a waiver of the requirement that he reside in the country of his nationality for two years before he is eligible to apply for an immigrant visa or permanent residence. The jurisdiction of this court is discussed below.

Park is a native and citizen of the Republic of Korea.[1] He first entered this country in 1966 as an exchange student sponsored by the Center for Cultural and Technical Interchange Between East and West. He obtained a Master's Degree in electrical engineering at the University of Hawaii in 1968, and has pursued other post-graduate studies. Park is a qualified computer systems engineer and is married to a Korean citizen. The Parks are the parents of two United States citizens, one three years old and the other born in December 1975.

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1 Commonly known as "South Korea."

Park entered the United States as a student pursuant to Section 101(a)(15)(j) of the Immigration and Nationality Act (Act), 8 U.S.C. Sec. 1101 (a)(15)(j). A person admitted under this section is not eligible to apply for an immigrant visa or permanent residence unless he has resided and been physically present in the country of his nationality or last residence for an aggregate of at least two years following departure from the United States. Act Sec. 212(e)(i), 8 U.S.C. Sec. 1152(e)(i). Simply stated, before Park can apply for permanent residence in this country, the law requires that he reside in Korea for at least two years.

Under certain circumstances, however, the Attorney General through the INS may waive the two-year foreign residency requirement of Section 212(e), thus removing that basis of ineligibility for an immigrant visa or permanent residence. One of the grounds for such a waiver is that the departure from the United States would impose "exceptional hardship" on the alien's United States citizen spouse or child. Act Sec. 212(e), 8 U.S.C. Sec. 1182(e).

Plaintiff applied for an "exceptional hardship" waiver, basing his claim on exceptional hardship to his three-year old son, Edgar, were he forced to depart the United States. The petition was denied by the Acting District Director of the INS, Portland, Oregon, on June 13, 1974. The Regional Commissioner of the INS affirmed denial of the petition on January 9, 1975.

Subsequent to the Regional Commissioner's affirmance, plaintiffs filed this action. The case thereafter was remanded to the INS for reconsideration in light of the birth of a second United States citizen child to the Parks. The

Regional Commissioner reviewed Park's petition, considered the birth of the new child, and again denied the waiver.

Plaintiffs now seek judicial review of the decision made by the INS.

Three matters are before the court; defendant's motion to dismiss, and the parties' cross-motions for summary judgment. Fed. R. Civ. P. 12(b)(1); 56.

I

THE MOTION TO DISMISS

INS has moved to dismiss on the ground that this court lacks jurisdiction to review this matter. Its attack contains two prongs: judicial review is vested solely in the court of appeals, and failure to exhaust administrative remedies.

A. Judicial Review. Section 106(a) of the Act, 8 U.S.C. Sec. 1105(a), was added to the Immigration and Nationality Act by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651. This Statute provides that the procedures for judicial review prescribed by the Hobbs Act, 64 stat. 1129, 68 Stat. 961,

> shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens . . . pursuant to administrative proceedings under section 242(b) of the Act . . . .

This "exclusive procedure" vests judicial review solely in the courts of appeals.

The issue to be determined here is whether, as INS contends, the exclusivity provision of 8 U.S.C. Sec. 1105a(a) applies to this action so as to vest review solely in the court of appeals. If Section 1105a(a)) does not apply here, this court has jurisdiction because

> (i)n situations to which the provisions of Sec. 106(a) (8 U.S.C. Sec. 1105a(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court.

Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 210 (1968).

The INS has relied upon Foti v. Immigration and Naturalization Service, 375 U.S. 217 (1963) for the proposition that this discretionary determination (the waiver denial) is within the statutory language of "final orders of deportation" in Section 1105a(a). Foti, however, does not control or even apply here. It is now clear that the judicial review provisions of Section 106(a) of the Act embrace only those determinations made during a deportation proceeding conducted under Section 242(b) of the Act, including those determinations made incident to a motion to reopen such proceedings. Cheng Fan Kwok, supra, at 216. It cannot be seriously contended that this waiver petition falls within the limitations set down in Cheng Fan Kwok. Therefore, this court must review the waiver denial. Cheng Fan Kwok, supra, at 210; Administrative Procedure Act (APA) Sec. 10(c), 8 U.S.C. Sec. 704; see Wong v. Immigration and Naturalization Service, 474 F.2d 739, 742

(9th Cir. 1973).[2]

B. Exhaustion. INS argues that because plaintiff has filed another petition for a waiver, he has not exhausted his administrative remedies, and that this court, therefore, lacks subject matter jurisdiction. The second petition, however, is not based upon the same grounds as the first. Even it if were, such an outstanding petition is no bar to judicial review. Section 10(c) of the APA, 8 U.S.C. Sec. 704.

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2 The most recent view stated by the Ninth Circuit is that the APA, like the Declaratory Judgment Act, 28 U.S.C. Sec. 2201, does not independently confer jurisdiction on this court. Wiren v. Eide, F.2d , No. 74-1169 (9th Cir., Sept. 3, 1975); see Yen v. Kissinger, 528 F.2d 1194, 1201 (9th Cir. 1975); contra, Brandt v. Hickel, 427 F.2d 53, 55 and 55 n. 2 (9th Cir. 1970).

I doubt that this court, as did the district court in Yen, supra, has jurisdiction under its habeas corpus power, 28 U.S.C. Sec. 2241. It would appear that the "in custody" jurisdictional prerequisite to Sec. 2241 habeas jurisdiction is lacking here.

I need not decide which, if either, statute independently confers jurisdiction. The APA, in conjunction with the rule announced in Cheng Fan Kwok and Wong, supra, give this court jurisdiction to review denials of discretionary relief.

II

THE SUMMARY JUDGMENT MOTIONS

The standard to be applied in reviewing the waiver denial is whether the ruling was capricious, arbitrary or an abuse of discretion. Mendez v. Major, 340 F.2d 128 (8th Cir. 1965); Talavera v. Pederson, 334 F.2d 52 (6th Cir. 1964).

Plaintiffs cite economic, social, health and political disadvantages in store for the Park children upon arrival in Korea. Plaintiffs assume that Park is "overeducated" and will find it difficult to locate meaningful, well-paying work in Korea. Plaintiffs further argue that the economic, social and political climates of Korea will expose the two Park children to repression and will diminish their educational opportunities, as well as their chances for good physical health. Plaintiffs further urge the court to consider the fact that these two United States citizens' ability to converse in English will be stunted by a two-year stay in Korea, thereby making future assimilation into American society more difficult.

In affirming the Acting District Director's ruling, the Regional Commissioner stated that were he to grant plaintiffs' petition for waiver, it would, in effect, "be a blanket authorization for waiver of the two-year foreign residence requirement for anyone from Korea with a citizen child." Record at 29. Plaintiffs contend that this language not only exhibits an arbitrary and capricious approach but also constitutes general rule making in violation of

5 U.S.C. Sec. 553.[3]

Park's case arouses much sympathy, but the law is against him.

After thorough review of the record, I conclude that the INS' decision was neither arbitrary, capricious, nor an abuse of discretion. The hardships relied upon by plaintiffs indeed would be encountered by any three-year old and infant sent to Korea to live for two years. Although plaintiffs cite the economic, social, health and political disadvantages in store for the Park children mentioned above, it is clear that these factors contribute to usual, rather than exceptional, hardships.

The economic and social conditions in Korea are no secret. The fact that political repression may be present in Korea is also no secret. It is quite pertinent, however, that many of these conditions existed in 1966 when Park left Korea, and that Park knew of the two-year return requirement when he entered this country. Furthermore, the legislative history of this waiver indicates a clear Congressional directive that it be applied stringently. The House committee which considered interrelationship between immigration and student exchange programs stated:

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[3] The second time this case came to this court (after the remand to the INS), the plaintiffs raised yet another argument: the de facto deportation of American citizen children in a case such as this is unconstitutional, citing Acosta v. Gaffney, No. 76-709 (D.N.J., May 12, 1976). Acosta holds that the INS may not constitutionally compel any citizen to submit to deportation since deportation may be imposed only upon aliens.

Simply stated, I disagree with Acosta because of the obvious "Pandora's Box" opened by the rationale of that decision.

> It is believed to be detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waiver, including cases where marriage occurring in the United States or the birth of a child or children is used to support the contention that the exchange alien's departure from this country would cause personal hardship.

Report No. 721 of the House of Representatives, prepared by Subcommittee No. 1 of the Committee on the Judiciary on the "Immigration Aspects of the International Education Exchange Program" (July 17, 1961).

Since I find no caprice, arbitrariness, or abuse of discretion on the part of the INS, plaintiffs' motion for summary judgment should be denied, and defendant's motion for summary judgment granted.

Dated this 17 day of August, 1976.

/s/ GEORGE E. JUBA
United States Magistrate

After review of the file and record in this case, I approve the foregoing recommendation.

IT IS ORDERED:

1. Defendant's motion to dismiss is denied;
2. Plaintiffs' motion for summary judgment is denied.
3. Defendant's motion for summary judgment is granted and the action is dismissed.

Dated this 18th day of August, 1976.

/s/ OTTO R. SKOPIL, JR.
United States District Judge

APPENDIX C

Title 5, Sec. 553. RULE MAKING. --(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply --

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency

shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (Sept. 6, 1966, P.L. 89-554, Sec. 1, 80 Stat. 383.)

Title 8, Sec. 1101. DEFINITIONS.

(a) As used in this Act--

* * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens--

* * * * * *

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the

United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j) (8 USCS Sec. 1182(j)), and the alien spouse and minor children of any such alien if accompanying him or following to join him.

Title 8, Sec. 1182. Excludable aliens

(a) General classes. Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * *

(e) Educational visitor status; foreign residence requirement; waiver. No person admitted under section 101(a)(15)(J) (A USCS Sec 1101 (a)(15)(J)) or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) (8 USCS Sec. 1101(a)(15)(J)) was a national or resident of a country which the Secretary of State, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section

101(a)(15)(H) or section 101(a)(15)(L)(8 USCS Sec. 1101(a)(15)(H) or (L)) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States; Provided, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of an alien whose admission to the United States is found by the Attorney General to be in the public interest: And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Secretary of State, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Secretary of State a statement in writing that it has no objection to such waiver in the case of such alien.

78-172

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October Term 1978

No. 78172

JIN WON PARK and THE SYSTEMS CORPORATION, a Hawaiian corporation,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE

SUPPLEMENTAL APPENDIX

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APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Northwest Regional Office
Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

File: A17 152 762 - Portland Jan 9, 1975
In re: Jin Won PARK

APPLICATION FOR WAIVER OF THE FOREIGN RESIDENCE REQUIREMENT UNDER SECTION 212(e) OF THE IMMIGRATION AND NATIONALITY ACT

Attorney or
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BEFORE THE REGIONAL COMMISSIONER

This case is before me on appeal from the June 13, 1974 order by the District Director, Portland, denying the application for waiver of the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act, as amended.

In arriving at his decision to deny, the District Director concluded that hardships which would be suffered by the applicant's minor United States citizen child would be those usual and normal hardships expected to accrue through an international move from a progressive Western country to an Asian environment. The District Director, citing the legislative history of the Mutual Educational and Cultural Exchange Act of 1961, properly held that a strict interpretation of the term "exceptional hardship" must be made in order to properly administer this Act in the

manner contemplated by the Congress at the time of its enactment.

On appeal counsel for the applicant, in a substantial brief and at oral argument, brings up numerous points which he alleges establish that the applicant's United States citizen child will experience extreme and unusual hardships if the applicant is required to comply with the two-year foreign residence requirement. It should be noted here that the applicant's child is in good health and expected hardships enumerated by counsel treat such conditions as: Inadequate housing, food, clothing, etc.; existence under a government that is practicing repressive tactics; inability of the applicant to obtain employment at the level of his educational achievement, thereby rendering him unable to earn sufficient income to properly maintain his family; and the possibility that the applicant being of an age of military liability, would be unable to depart from Korea as an immigrant after completion of two years residence there.

The record in this case has been thoroughly considered. Acceptance of counsel's appeal arguments as valid grounds for a finding of exceptional hardship within the meaning of the statute would, in effect, be a blanket authorization for waiver of the two-year foreign residence requirement for anyone from Korea with a citizen child. The applicant holds a Master of Science degree in electrical engineering granted by the University of Hawaii. Even though his occupational bent is toward the highly technical area of sophisticated data processing systems, it is inconceivable that a person of such educational achievement would be unable to find employment providing a suitable salary to support a wife and child in Korea. The District Director's finding that the applicant's

child would suffer only usual and normal hardships is correct and proper. On appeal the applicant has failed to furnish evidence which would cause reversal of the District Director's order. The appeal will be dismissed.

IT IS ORDERED that the appeal be and the same is hereby dismissed.

REGIONAL COMMISSIONER
Northwest Region

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Northwest Regional Office
Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

File: A17 152 762 - Portland March 1976

In re: Jin Won PARK

APPLICATION FOR WAIVER OF THE FOREIGN RESIDENCE REQUIREMENT UNDER SECTION 212(e) OF THE IMMIGRATION AND NATIONALITY ACT

Attorney or
Representative: Gerald H. Robinson
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1400 Standard Plaza
Portland, Oregon 97204

BEFORE THE REGIONAL COMMISSIONER

On January 9, 1975, the former Regional Commissioner dismissed the applicant's appeal from denial of his application for waiver of the two year foreign residence requirement of section 212(e) of the Immigration and Nationality Act, as amended. The applicant carried the matter into the United States District Court, District of Oregon. During court proceedings it was ascertained that the applicant's spouse was pregnant and expected to give birth to a child in late December 1975. The matter has been remanded to this office for reconsideration of our previous decision in light of the pregnancy of the applicant's spouse. I, therefore, order on my own motion that this case be reopened.

The record contains a certificate of live birth indicating that a female child was born to the applicant and his spouse in Portland, Oregon, on December 21, 1975. Although the record is silent in this respect, it is presumed that

the mother and child have been released from the hospital and are currently residing with the applicant.

Aside from the fact that the applicant and his spouse are now parents of two United States citizen offspring instead of one, the record of proceeding in this case remains identical to that which was considered at the time of our order of January 9, 1975. I have carefully reviewed all of the record material in this matter, and find that there is nothing upon which to base a finding that the newborn child of this couple will experience any more of an exceptional or unusual hardship from residing with her parents in Korea than will the child already considered in the original decision. I, therefore, find no basis for a change of position by the Immigration Service in this case.

IT IS ORDDERED that this reopened appeal be and the same is hereby dismissed.

REGIONAL COMMISSIONER
Northern Region

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIN WON PARK AND THE SYSTEMS CORPORATION, a Hawaiian corporation, Appellants	)	No. 76-3336
vs.	)	ORDER
IMMIGRATION AND NATURALIZATION SERVICE, Appellee	)	

Appeal from Judgment of the United States District Court for the District of Oregon

Before: ELY, TRASK and ANDERSON, Circuit Judges

After due consideration, the petition for rehearing is DENIED.

Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

No. 78-172

In the Supreme Court of the United States

OCTOBER TERM, 1978

JIN WON PARK and THE SYSTEMS CORPORATION,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

Neither the opinion of the court of appeals (Pet. App. A-1) nor the opinion of the district court (Pet. App. A-3) is reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1978. A petition for rehearing was denied on May 25, 1978. The petition for a writ of certiorari was filed on July 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service properly found no "exceptional hardship" in denying petitioner's application for waiver of the two-year foreign residence requirement under 8 U.S.C. 1182(e) for student-exchange visitors who seek to live in this country permanently.

2. Whether the foreign residence requirement unconstitutionally imposes de facto deportation on petitioner's children who are United States citizens.

3. Whether the court of appeals improperly equated "exceptional hardship" with "extreme hardship."

4. Whether the Immigration and Naturalization Service in ruling on petitioner's waiver application made a rule applicable to all South Koreans who apply for hardship waivers and was therefore required to comply with the rule-making provisions of the Administrative Procedure Act.

STATEMENT

In May 1966, petitioner Park,[1] a citizen of the Republic of Korea, successfully applied to enter the United States to study electrical engineering as a nonimmigrant exchange student. See 8 U.S.C. 1101(a)(15)(J) (A.R. 149).[2] Petitioner entered this country in June 1966 (A.R. 147, 148) and ultimately was allowed to extend his stay through December 1973 in order to continue his graduate

[1]Co-petitioner Systems Corporation is petitioner Park's employer. Hereafter, the term "petitioner" will refer to petitioner Park.

[2]"A.R." refers to the administrative record which is part of the record on appeal in the court of appeals. The separately paginated portion of the record on appeal is referred to as "R."

studies (A.R. 146, 144, 142, 140, 138, 136, 134, 119). Every application filled out and signed by petitioner stated that under 8 U.S.C. 1182(e), foreign exchange students are ineligible to apply for an immigrant visa or for permanent residence in this country until they have resided in their home country for at least two years after leaving the United States (A.R. 149, 147, 145, 143, 141, 139, 137, 135, 120). Petitioner was also informed that the two-year foreign residence requirement may be waived under Section 1182(e) if departure from the United States would impose "exceptional hardship" on the alien's spouse or child, if the spouse or child is an American citizen or a resident alien (*Ibid.*).

In 1969, three years after entering this country, petitioner married a Korean citizen. The couple's first child, an American citizen by birth, was born in 1972 (Pet. App. A-3; A.R. 121, 126). In October 1973, deportation proceedings were instituted against petitioner on the ground that he was no longer a student (A.R. 132). In December 1973, petitioner applied for a waiver of the foreign residence requirement, alleging that it would cause exceptional hardship to his citizen child (A.R. 122). Petitioner alleged that he would not be likely to find employment in Korea in his field of computer engineering and that the cost of returning to Korea would impose a financial hardship that in turn would cause "exceptional hardship" to his child (A.R. 127-128).

Petitioner's application was denied by the Acting District Director of the Immigration and Naturalization Service (INS) on the ground that petitioner had alleged usual rather than exceptional hardships (A.R. 116-118). Petitioner appealed to the INS Regional Commissioner, alleging that adverse economic, social, and political conditions in Korea, as well as the possibility that he

would not be permitted to leave that country after the two years, constituted exceptional hardships for his citizen child (A.R. 28, 30-39). The Regional Commissioner dismissed the appeal, observing that (A.R. 29):

> Acceptance of counsel's appeal arguments as valid grounds for a finding of exceptional hardship within the meaning of the statute would, in effect, be a blanket authorization for waiver of the two-year foreign residence requirement for anyone from Korea with a citizen child.

Petitioner then filed a complaint in the United States District Court for the District of Oregon seeking review of the Service's denial of his waiver application (R. 1-6; A.R. 22-27).[3] The district court found no abuse of discretion or arbitrary administrative action, and granted the Service's motion for summary judgment (Pet. App. A-3 to A-10). The court of appeals affirmed in a memorandum opinion (Pet. App. A-1 to A-2).

ARGUMENT

1. Petitioner contends (Pet. 9-11) that the INS improperly interpreted Section 1182(e)'s "exceptional hardship" test by allegedly applying to Korean applicants a standard different from that applied to applicants from other countries. This claim misconstrues the administrative action that occurred here.

The apparent basis for petitioner's contention is the Regional Commissioner's statement that acceptance of petitioner's argument "would, in effect, be a blanket authorization for waiver of the two-year foreign residence

[3]Since petitioner and his wife had had a second citizen child in the interim, the district judge remanded the case. The Service again rejected petitioner's claim of exceptional hardship (R. 55-56).

requirement for anyone from Korea with a citizen child." The reference to Korea in that statement is obviously responsive to the contentions made by petitioner with respect to economic, social, and political conditions in that country. Moreover, a review of all three INS opinions in this case (Pet. App. A-15 to A-19; A.R. 28-29, 116-118; R. 55-56) demonstrates that the Service analyzed the totality of petitioner's circumstances and concluded that there was no showing of exceptional hardship as that phrase has been consistently interpreted and applied with regard to applicants from all countries. Thus, petitioner failed to prove that a two-year period of foreign residence would, for instance, significantly endanger an ill citizen child or cause family separation. See *Matter of Ambe*, 13 I. & N. Dec. 3 (Dist. Dir. 1968); *Matter of Vicedo*, 13 I. & N. Dec. 33 (Dist. Dir. 1968). Petitioner alleged the sort of hardships generally entailed in any relocation from the United States to a part of the world that is less developed and less politically free. See, *e.g.*, *Perdido* v. *INS*, 420 F. 2d 1179 (5th Cir. 1969) (no exceptional hardship for Philippine couple with two citizen children); *Matter of Prabhakar*, 13 I. & N. Dec. 314 (Dist. Dir. 1968) (economic hardship and dislocation for citizen child on return to Far East insufficient to show exceptional hardship). Accordingly, the district judge and the court of appeals correctly upheld the Service's exercise of discretion. See *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 76-77 (1957).

Moreover, petitioner's analysis of the exceptional hardship standard would result in granting most if not all applications made by persons from the least-developed countries while denying those made by applicants from the industrialized nations, an outcome that would pervert the congressional purpose embodied in Section 1182(e). That Section was enacted to ensure that persons from

less-developed countries who receive advanced training in this country under our foreign exchange programs would return to their home countries and utilize their training there. See Rep. No. 372, 87th Cong., 1st Sess. 19-20 (1961). Congress left no doubt that, in order to stem the flow of technically skilled workers from the underdeveloped nations, the two-year foreign residence requirement was to be strictly applied even where citizen children were concerned:

> The subcommittee hereby *reiterates and stresses* * * * the fundamental significance of a *most diligent and stringent enforcement of the 2-year foreign residence requirements* of [8 U.S.C. 1182(e)].
>
> It is noted that by far the largest number of applications for waivers of the above-cited provisions of the law come *from nationals of countries who are in urgent need for expansion and improvement of their technological establishments and their health facilities.* It is believed to be detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers *including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship.*

H.R. Rep. No. 721, 87th Cong., 1st Sess. 121 (1961) (emphasis in original).

Since the denial of petitioner's waiver application was consistent with both the Service's prior practice and the legislative intent behind Section 1182(e), there is no merit to petitioner's claim that the exceptional hardship test was improperly applied here.

2. Petitioner further argues (Pet. 11-14) that the two-year foreign residence requirement of Section 1182(e) works a de facto deportation of his citizen children in violation of due process of law.[4] That contention has been consistently rejected by the courts with respect to Section 1182(e) in particular, *Silverman* v. *Rogers*, 437 F. 2d 102, 107 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971); *Perdido* v. *INS*, *supra*, 420 F. 2d at 1181-1182; *Mendez* v. *Major*, 340 F. 2d 128, 131-132 (8th Cir. 1965), and with respect to the citizen children of deportees generally. *Mamanee* v. *INS*, 566 F. 2d 1103, 1105-1106 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F. 2d 1153, 1157-1158 (3d Cir. 1977).

Congress has the power to determine the conditions under which an alien may enter and remain in this country. The conditions Congress has imposed include a two-year foreign residence requirement for exchange-student visitors who seek to reside here permanently—a requirement of which petitioner had repeated notice (A.R. 149, 147, 145, 143, 141, 139, 137, 135, 120). Section 1182(e) does not affect the citizenship of petitioner's children. They may remain in this country now or leave and return at any time. On the other hand, acceptance of petitioner's argument would substantially undercut the congressional limitations on immigration, in view of the "relative ease with which aliens can enter this country as students or visitors and then delay their departure long

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[4]Insofar as the heading of Point II of petitioner's argument indicates that petitioner is also challenging the constitutionality of his own deportation, his argument is without merit. The continued stay of an alien in this country is not a right but "a matter of permission and tolerance." *Harisiades* v. *Shaughnessy*, 342 U S. 580, 586-587 (1952). Here Congress reasonably imposed a two-year foreign residence requirement on all exchange-student visitors who desire to reside here permanently.

enough to produce citizen children." *Lee* v. *INS*, 550 F. 2d 554, 556 (9th Cir. 1977); see also *Acosta* v. *Gaffney*, *supra*, 558 F. 2d at 1158.

3. Petitioner also argues (Pet. 14) that the court of appeals erred in allegedly equating the phrase "exceptional hardship" in 8 U.S.C. 1182(e) with "extreme hardship" in 8 U.S.C. 1254(a)(1).[5]

This contention lacks substance. The Service correctly applied the exceptional hardship standard to petitioner's application (Pet. App. A-15 to A-19; A.R. 28-29, 116-118; R. 55), and the court of appeals reviewed this determination under the appropriate "abuse of discretion" standard (Pet. App. A-1). In concluding that the Service had not abused its discretion, the court, using the "see" introductory signal, did cite three appellate cases upholding Service rejections of Section 1254(a)(1) applications (Pet. App. A-1). Since these applications involved allegations of hardship essentially identical to those asserted by petitioner, and since "extreme hardship" and "exceptional hardship" are at least analogous standards, the court justifiably relied on the three opinions as "basic source material that supports the proposition." *A Uniform System of Citation* §2:3, at 6-7 (12th ed. 1976). In any event, petitioner could not have established sufficient hardship under either standard. Compare, *e.g.*, *Lee* v. *INS*, *supra*, 550 F. 2d at 556 (inconvenience to citizen child and economic detriment to family not sufficient to show extreme hardship), with

[5]Section 1254(a)(1) provides for discretionary suspension of deportation where, in addition to other conditions, deportation would "result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *."

Perdido v. *INS*, *supra*, 420 F. 2d at 1180-1181 (adjustment hardships for two citizen children of Philippine parents not sufficient to show exceptional hardship).

4. Lastly, petitioner claims (Pet. 15-16) that the INS Regional Commissioner "in effect made a rule concerning all South Korean hardship waivers," but failed to comply with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. 500 *et seq.* But the Regional Commissioner, of course, made no rule. The administrative action here was an adjudication—the application of a statutory standard to the facts of an individual case, see *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973). The determination that petitioner failed to meet the "exceptional hardship" standard does not prevent another applicant from South Korea from establishing that, on the facts of his case, the standard has been met. The requirements for rule-making set forth in the Administrative Procedure Act have no application to adjudicative proceedings such as this one. *Mehta* v. INS, 574 F. 2d 701, 705 (2d Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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